In the Supreme Court of the United States

October Term, 1972

No. 71-1553

JOHN J. GILLIGAN, GOVERNOR OF OHIO, ET AL.,
Petitioners,

v.

CRAIG MORGAN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRELIMINARY STATEMENT

Petitioners believe that a large portion of Plaintiffs-Respondents' (herein referred to as Plaintiffs) Brief deals with matters which are either not involved in this case or are not in dispute. Petitioners will therefore attempt to define the issues which they feel are in dispute.

The issue of whether Plaintiffs are entitled to damages if they can prove deprivations of constitutional rights, is not before this Court. Plaintiffs did not request damages in their Complaint.

The issue of whether plaintiffs have standing is also not before this Court. The Court of Appeals refused to rule on the issue of whether Plaintiffs are appropriate representatives of the class they purport to represent and reserved it for determination by the District Court (Cert.

22, 456 F.2d at 615).[1] For the purposes of this Appeal, Petitioners do not dispute the standing of Plaintiffs to represent the class.

Petitioners also do not dispute the following contentions: An arbitrary and unjustified killing by state officials constitutes a deprivation of life without due process; summary punishment without due process violates rights secured by the Fourteenth Amendment; the First Amendment protects the right of peaceable assembly and the right to petition for redress of grievances from arbitary denial by state action; and the use of physical force by the government to arbitrarily prevent the occurrence of such assemblies is a deprivation of such a right.

Petitioners contend that the relief requested is not proper under the circumstances of this case. Petitioners are particularly concerned with the relief requested in paragraph (b) of the prayer of the Complaint. Plaintiffs seek to enjoin the defendants and their successors in office (Petitioners herein) from ordering the National Guard to duty on the Kent campus unless they have been competently trained; have been provided with the best available non-lethal equipment; have been specifically ordered not to use deadly force; and have been ordered not to carry live ammunition (App. 11). Petitioners also contend, however, that any relief which would enjoin or require certain training, or orders or the use of certain weapons, would be improper.

Plaintiffs in their brief cite *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), and a number of lower court cases which indicate that injunctive relief against police misconduct is appropriate under certain circumstances. Cases involv-

[1] References to the appendix will be designated (App. —). The opinion of the Court of Appeals is contained in the Petition for Certiorari, references to the opinion will be designated (Cert. —, 456 F.2d —). References to the brief of Plaintiffs-Respondents and to the main brief of Petitioners will be designated (Resp. —) and (Pet. —).

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ing police misconduct are apparently analogous to the allegations of misconduct in the instant case. However, Petitioners contend that an analysis of these cases shows they are readily distinguishable.

The political question doctrine was not, and could not have been, raised in the police cases. The allegations in the police cases raised issues which are peculiarly suited for judicial determination. The issues as framed by the Court of Appeals in this case are not judicially manageable. The effect of the injunctive relief upon legitimate state activities in the police cases was minimal. In the instant case the requested relief would seriously hinder the ability of the state to protect itself from civil disorders.

Petitioners therefore contend that the *Hague case* and the other cases granting injunctive relief are distinguishable from the instant case and that the reasoning of those cases is not controlling or even persuasive.

ARGUMENT

Political Question

The political question doctrine is essentially a function of the separation of powers. It arises out of the relationship between the judiciary and the coordinate branches of the federal government and not the relationship of the federal judiciary to the states. *Baker* v. *Carr*, 369 U.S. 186, 210 (1962). None of the cases relied upon by Plaintiffs involved the relationship between the judiciary and a coordinate branch of the federal government. The political question doctrine was therefore not applicable. There was no possibility of a constitutional commitment of the issue to a coordinate political department; no possibility of a lack of respect due coordinate branches of government; no possibility of multifarious pronouncements by the various departments; and no possibility of any of the other factors which may give rise to a political question. See *Baker* v. *Carr, supra*, 369 U.S. at 217.

In the instant case, however, all of the formulations which may describe a political question are present. Article I, Section 8, Clause 16 of the Constitution commits to Congress the power and responsibility to prescribe the proper training, weaponry and orders of the National Guard. Congress, pursuant to its constitutional authority, has enacted legislation governing these matters. See, e.g., 70A Stat. 609 *et seq.*, 32 U.S.C. 501 *et seq.* It has also given the Executive the authority to prescribe regulations and issue orders governing the National Guard. 70A Stat. 600, 32 U.S.C. 110. Any relief which the District Court could give would necessarily indicate a lack of respect in the legislative and executive departments and a lack of confidence in the ability of these branches to carry out their responsibilities. Judicial relief as to the training, weapons or orders of the National Guard would also create the possibility of a conflict between the order of the court and existing or future pronouncements on the subject by Congress or the President (See Pet. 8-10).

Petitioners contend that the political question doctrine, which was not applicable in the cases involving police misconduct, justified the denial of injunctive relief by the District Court.

Lack of Judicially Manageable Standards

The issues presented for review in the cases relied upon by Plaintiff are readily distinguishable from those in the instant case. In *Hague* v. *C. I. O.*, *supra*, 307 U.S. 496, and the other cases which approved injunctive relief, the plaintiffs made factual allegations, which if true, showed a systematic pattern of police misconduct directed against an identifiable group. The injunctive relief which plaintiffs requested and the court approved was limited to the specific misconduct involved. None of the cases required a judicial determination of the propriety of the

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training, weapons or orders of the police. None enjoined or required certain police training or the use of certain equipment. For example, in the *Hague case* municipal officials of Jersey City, New Jersey, had forcibly excluded and removed from the city any representatives of labor organizations. They had also prevented such representatives from distributing handbills and denied them access to the public parks.

In *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966), Baltimore police searched over 300 homes in black neighborhoods. No warrants were obtained and in almost every instance the search was based upon an unverified anonymous tip.

Plaintiffs in *Schnell* v. *City of Chicago*, 407 F.2d 1084 (7th Cir. 1969) represented a class of news photographers whose right to gather and report news had been massively interfered with during the Democratic National Convention.

These cases raise questions such as whether there has been a denial or abridgment of freedom of speech or freedom of the press; whether there has been an unreasonable search and seizure; etc. Federal courts have traditionally dealt with and resolved such questions. The court need only determine whether there has been police misconduct which results in a deprivation of constitutionally protected rights and whether there is such a pattern of misconduct that there is a threat of future deprivations. If the court finds such a pattern it may enjoin the misconduct. All of these matters are particularly susceptible of judicial resolution.

In the instant case the issue presented for review is not whether there has been a pattern of misconduct on the part of the National Guard but whether there has been a pattern of training, weaponry and orders which would require the use of fatal force where such force is not reason-

ably necessary. The proper training, weapons and orders of a military organization or even of a police department is not an issue which federal courts have resolved in the past. None of the cases relied upon by Plaintiffs required the court to review or resolve such matters.[2]

Petitioners contend that this issue is not an appropriate one for judicial determination and that the District Court properly refused to grant such relief.

Impact Upon Legitimate State Activities

Petitioners recognize that *Younger* v. *Harris*, 401 U.S. 37 (1971) and its companion cases involved state prosecutions. However, the principle of federalism or "Our Federalism" explained in the majority opinion in *Younger* is not limited to criminal prosecutions. It describes the concept which should apply in all areas of possible conflict between the state and national governments. See, e.g., *Bute* v. *Illinois*, 333 U.S. 640, 658-659 (1948); *Union Brokerage Co.* v. *Jenson*, 322 U.S. 202, 207-208 (1944). Under this concept the national government always attempts to protect federal rights in ways which will not unduly interfere with the legitimate activities of the states (401 U.S. at 444).

Petitioners have no dispute with the relief granted in the cases relied upon by Plaintiffs. The results in these cases do not offend or violate the principle of federalism described in *Younger*. In some of these cases this principle

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[2] In the only applicable cases which Petitioners have been able to find, the court has deferred to the discretion of the military in these matters. See, e.g., *Drifka* v. *Brainard*, 294 F.Supp. 425, 428 (W.D. Wash. S.D. 1968); *McAbee* v. *Martinez*, 291 F. Supp. 77, 78 (D. Md. 1968). In *Bright* v. *Nunn*, 448 F.2d 245 (6th Cir. 1971), relied upon by the majority below in support of its position, the court found the claims that the Guard was untrained for campus disorders and were permitted to carry guns with live ammunition, did not reach constitutional proportions.

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was recognized and discussed. The courts expressed their concern about unnecessary encroachment upon the functions of state and local governments. See, e.g., *Lewis* v. *Kugler*, 446 F.2d 1343, 1352 (3rd Cir. 1971); and *Lankford* v. *Gelston, supra*, 364 F.2d at 201. However, upon balancing the constitutional rights of the individuals involved against the possible harm to legitimate activities of the state, the courts decided in favor of the individuals.

These cases, almost without exception, involved such a clear pattern or policy of deprivation of constitutional rights that a repetition could be expected. The injunctive relief was limited to conduct which was clearly illegal and which could not be justified under any circumstances. There was therefore little risk that beneficial police action would be inhibited. Enjoining forcible exclusion and removal of representatives of labor organizations or enjoining the search of a private house based only on an anonymous tip, would not prevent legitimate law enforcement practices.

In the instant case, however, the allegations do not show as clear a pattern or policy of misconduct as the cases involving the police. There is therefore less basis to expect or presume a repetition of such conduct. Petitioners feel that the threat to Plaintiffs of future deprivations is no more substantial than the threat to the intervening plaintiffs in *Younger* v. *Harris, supra*, 401 U.S. at 42. However, even if we presume that the threat is sufficient to invoke the equitable jurisdiction of a federal court, the probability of future deprivations is substantially less in this case than in the police cases.

The possibility of harm to the interests of the state, on the other hand, is much stronger than in the police cases. The conduct complained of took place during disorders which could not be controlled by civil authorities. The validity of such conduct would therefore depend upon

conditions prevailing at the time. Any relief which the District Court could grant could inhibit constitutional, as well as unconstitutional, methods of controlling the disorders.

In addition, the relief requested herein, and particularly the relief requested in paragraph (b) of the prayer of the Complaint (App. 11), is broader than that approved in the police cases. None of those cases enjoined the training or use of weapons by police. Such relief would seriously interfere with a legitimate state activity – the control of civil disorders. It would hinder and restrict the ability of the state to prepare for and control such disorders (See Pet. 12-13).

Petitioners therefore contend that the denial of injunctive relief by the District Court was a proper exercise of its discretion.

CONCLUSION

For the above reasons Petitioners respectfully submit that the action of the District Court herein was a proper exercise of its discretion. Petitioners therefore submit that the judgment of the District Court should be affirmed and the portion of the judgment of the Court of Appeals involved herein should be reversed.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

THOMAS V. MARTIN
Assistant Attorney General
State House Annex
Columbus, Ohio 43215
(614) 469-2872

ATTORNEYS FOR PETITIONERS

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